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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. A-984

JIMMIE L. WALTERS,
Petitioner,

vs.

STATE OF ARKANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Arkansas

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JIMMIE L. WALTERS,
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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Arkansas

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Jimmie L. Walters, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on January 21, 1974.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported at 255 Ark. 904, 503 S.W.2d 895 (1974), and is printed in Appendix "A" hereto, infra, page A-1. The journal entry of judgment of the Circuit Court of Van Buren County, Arkansas is printed in Appendix "B" hereto, infra, page A-5.

JURISDICTION

The judgment of the Supreme Court of Arkansas (Appendix A, infra, page A-1) was entered on January 21, 1974. Rehearing was not sought. Justice Blackmun extended the time for this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether one accused of a crime of first degree murder may be tried again for the higher offense in violation of the Fifth and Fourteenth Amendments and of this Court's decisions in *Green v. U.S.*, 355 U.S. 184; *Price v. Georgia*, 398 U.S. 323; *U.S. v. Jorn*, 400 U.S. 470; *Gori v. U.S.*, 367 U.S. 364; *Downum v. U.S.*, 372 U.S. 734; after the jury reports its deliberations in open court that it is deadlocked between outright acquittal and a conviction for no higher offense than involuntary manslaughter.

2. Whether the jury's findings of an absence of a premeditated, intentional or malicious act bar prosecution again for the higher offense under the Fifth and Fourteenth Amendments.

3. Whether the petitioner was denied due process of law and a fair and impartial trial guaranteed under the Sixth and Fourteenth Amendments by admission into evidence of his purported confession without affording him an in camera hearing on the admissibility of such confession as required in *Jackson v. Denno*, 378 U.S. 368, and in the absence of some showing that the petitioner had been appropriately advised of his Fifth and Sixth Amendment rights pursuant to *Miranda v. Arizona*, 384 U.S. 486, or that he had voluntarily, knowingly and intelligently waived those rights.

4. Whether the petitioner was denied due process of law and a fair and impartial trial guaranteed under the Sixth and Fourteenth Amendments by prejudicial comments by the trial judge and the prosecution in the presence of the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution.

2. The Sixth Amendment, United States Constitution.

3. The Due Process Clause, Fourteenth Amendment, United States Constitution.

4. *Ark. Stat. Ann.* § 43-1226 (Repl. 1964).

> "43-1226 Offense of different degrees—Where an offense consists of different degrees, a conviction, or acquittal by judgment upon a verdict shall be a bar to another prosecution for the offense in any of its degrees."

STATEMENT

A. Course of proceedings in the case now before this Court.

In February, 1973, petitioner was tried for first degree murder in the Circuit Court of Van Buren County, Arkansas in the case entitled, State of Arkansas v. Jimmie L. Walters, and a mistrial was declared (App. "A").

On March 5, 1973, petitioner filed a motion to suppress statements taken from petitioner (T. 6-A).

On April 4, 1973, petitioner filed a motion in the trial court to dismiss the charges of first degree murder, second degree murder, and voluntary manslaughter (T. 7-A, 8-A).

On May 10, 1973, petitioner was again tried on the same charge of first degree murder in the Circuit Court of Van Buren County, Arkansas in the case entitled, *State of Arkansas v. Jimmie L. Walters*, No. CR 5-73, and was found guilty by a jury of the offense of second degree murder. Judgment was entered and petitioner was sentenced to five years imprisonment (App. "B").

On January 21, 1974, the Arkansas Supreme Court affirmed the judgment of the trial Court (App. "A").

B. **Relevant facts concerning the case before this Court:**

The petitioner was charged with the crime of murder in the first degree (T. 4-A). A mistrial was declared at the conclusion of the first trial after the jury reported in open court its deliberations, that it was deadlocked 7 to 5, one segment voting for acquittal, and the other for conviction of the lesser offense of involuntary manslaughter (App. "A"). At the commencement of the second trial, the petitioner pleaded the doctrine of former jeopardy as a bar to prosecution for any higher offense than involuntary manslaughter, inasmuch as the first jury's finding, reported in open court, exonerated the petitioner of any premeditated, intentional or malicious slaying or criminal action (App. "A") (T. 7-A).

The trial judge denied petitioner's motion or plea of former jeopardy and subjected the petitioner a second time to a prosecution for murder in the first degree.

Just prior to the second trial, petitioner filed a motion to suppress statements taken from him by the State without first advising petitioner of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 486, and which were involuntarily made (T. 6-A). During the course of the second trial, the trial court denied

petitioner a hearing on the voluntariness of his confession as required by *Jackson v. Denno*, 378 U.S. 368, (T. 49) on the basis that petitioner had waived his rights at a hearing in chambers prior to the second trial (T. 1, 2).

The record is replete with numerous prejudicial comments and acts by the trial judge and the prosecutor (T. 1, 2, 48, 49, 119, 120, 157).

The second trial ended in a conviction of murder in the second degree (App. "A"). It should be noted that at the second trial when the jury reported it was hung, the trial court sent the jury back for further deliberations (T. 193), while at the first trial when the jury reported it was hung, the trial court declared a mistrial (App. "A"). On his appeal to the Arkansas Supreme Court, petitioner relied principally on the doctrine of former jeopardy as a ground for reversal, but also relied on the trial court's preoccupation in assisting the prosecutor in obtaining a conviction (App. "A"). The Arkansas Supreme Court ruled and determined that the statements by the trial court and the jury foreman at the first trial could not be considered as a formal verdict of the jury, and summarily rejected the petitioner's contention that the trial court was preoccupied in assisting the prosecutor in obtaining a conviction (App. "A").

REASONS FOR GRANTING THE WRIT

I

The Arkansas Supreme Court decided the issue of double jeopardy in a way contrary to the provisions of the Fifth and Fourteenth Amendments and the decisions of this Court. The facts of this case present a unique and novel constitutional question not heretofore decided by this Court.

It is well settled that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707.

The Arkansas Supreme Court found that there was no implied acquittal of the petitioner of the offenses above involuntary manslaughter (App. "A"). The Court, basing its decision on *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824), found that there was no abuse of discretion by the trial court in declaring a mistrial. The Court further held,

> ". . . the statements between the trial court and the jury foreman cannot be considered under the circumstances as a verdict of the jury" under *Ark. Stat. Ann.* § 43-1226 (Repl. 1968).

The Arkansas Supreme Court glossed over the most important element of the *Perez* decision, that there must be a "manifest necessity" to declare a mistrial and discharge a jury before a verdict is entered. Furthermore,

> ". . . the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *U. S. v. Perez*, supra.

Jeopardy attaches when a mistrial is declared to harass an accused by a subsequent trial or to give the State a better chance

to convict at a second trial. Before a mistrial is declared, the Court is to resolve any doubt in favor of an accused's liberty, rather than exercise an "unlimited, uncertain and arbitrary judicial discretion." *Downum v. U. S.*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); *Gori v. U. S.*, 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961). The accused should not be subjected to the "embarrassment, expense and ordeal" of a second trial which forces "him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Ex Parte Lange*, 18 Wall. 163, 21 L.Ed. 872; *Green v. U. S.*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

In *Green v. U. S.*, supra, the jury, although having the opportunity to convict the defendant of either first or second degree murder, found him guilty of only second degree murder. Green appealed and the conviction for second degree murder was reversed and remanded. At a new trial he was again tried for first degree murder.

This Court, holding that the second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution, stated:

> "In this situation the great majority of cases in this country have regarded the jury's verdict as an *implicit acquittal* on the charge of first degree murder. But the result in this case need not rest alone on the assumption which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. *For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent.* * * * Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.
>
> "* * * We believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had re-

> turned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree." (Emphasis supplied.)

To the same effect as *Green*, supra, was this Court's decisions in *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757 (1970), and which the Arkansas Supreme Court passed over without comment on appeal in this case (App. "A").

In the *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547 (1971), this Court established petitioner's option to have his case considered by the first jury and the petitioner is denied that option when the trial judge aborts the trial without the petitioner's consent. It is clear that the peitioner here did not consent to the declaration of a mistrial, but the Arkansas Supreme Court treated the decision in *United States v. Jorn*, supra, as not being applicable to petitioner's case on appeal (App. "A").

It must be noted that the trial court did not declare a mistrial until the jury announced that it was deadlocked between involuntary manslaughter and not guilty. This was noted on appeal and the Arkansas Supreme Court held that it was an "inadvisable" act, but that the record indicated that the trial court had already indicated an intent to declare a mistrial (App. "A"). The point that is important here is that the trial court had not declared a mistrial, the jury had not previously been asked to deliberate further, and the court could have sent the jury back for further deliberations.

Under the decision of the Arkansas Supreme Court in this case and all cases such as this, there would always be a "manifest necessity" to declare a mistrial where the jury first hints that it is deadlocked. The trial court could always arbitrarily pick and choose when to declare a mistrial, after finding out how the jury stood on different degrees of an offense. Under this decision the trial court could arbitrarily declare a mistrial if the jury indicated that it might convict of a higher offense. The de-

cision rendered by the Arkansas Supreme Court distorts beyond recognition the principles of *United States v. Perez*, supra; the protection of the Fifth Amendment's bar against double jeopardy; and the concepts of due process of law of the Fourteenth Amendment.

It is clear in this case that there was no "manifest necessity" to declare the first trial a mistrial; that the jury in the first instance had already acquitted the petitioner of any offense higher than involuntary manslaughter; and that the jury had found an absence of a premeditated, intentional, or malicious act on the part of petitioner. It is equally clear, that under the concepts stated in *Green v. United States*, supra, *United States v. Jorn*, supra, and *Price v. Georgia*, supra, the petitioner could not have been tried a second time for an offense higher than involuntary manslaughter.

The Arkansas Supreme Court applied the concepts of the Fifth Amendment's bar against double jeopardy grudgingly and narrowly and deprived petitioner of due process of law.

II

The Arkansas Supreme Court's finding that there was no preoccupation on the part of the trial judge in helping the prosecution obtain a conviction is contrary to the fair trial and due process protection of the Sixth and Fourteenth Amendments, where the record here shows a denial of a hearing as to the voluntariness of petitioner's confession.

At the second trial, the petitioner's statement was admitted into evidence (T. 49) without a judicial determination as to whether or not the statement was voluntarily made as required by *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 90 (1964).

Petitioner's contention on appeal that the trial court was preoccupied in helping the prosecution obtain a conviction raised

the issue of denial of a fair trial and due process and thereby fairly placed the issue here before the Arkansas Supreme Court.

The record of the second trial shows that no Miranda warnings were given to petitioner prior to his making statements to various law enforcement officers (T. 6, 18) and prior to the taking of his written statement by the Arkansas State Police (T. 32, 48) as required by this Court's decision in *Miranda v. Arizona*, 384 U.S. 486, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Prior to the second trial a hearing was held in chambers at which the petitioner was held to have waived his constitutional right under *Miranda*, supra, and other constitutional rights which were not defined. (T. 1, 2).

The question of waiver is controlled by federal law and there is a "presumption against waiver of constitutional rights." *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). An accused must have "actual knowledge" of the existence of his constitutional rights, "full understanding of their meaning and clear comprehension of the consequences of their waiver", *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937); *U.S. v. Escandar*, 465 F. 2d 438 (5th Cir. 1972), and the record must show a basis for the conclusion of the required knowledge and explanation. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274.

The State failed to sustain the "heavy burden" placed on it to show that the petitioner waived his Fifth and Sixth Amendment rights. *Miranda v. Arizona*, supra; *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

There is no evidence in the record that the petitioner, at the pretrial proceedings (T. 1, 2), had actual knowledge of the existence of his constitutional rights, a full understanding of their meaning or a clear comprehension of the consequences of his "waiver" of his rights. To the contrary, the record of the pretrial proceeding did not specify any particular constitutional

rights, and no inquiry was made to determine if petitioner understood the consequences of his waiver. Petitioner cannot be said to have knowingly and intelligently waived any constitutional rights at this proceeding.

When the State attempted the introduction into evidence of petitioner's written statement the petitioner's counsel objected on the basis that the statement was not voluntary (T. 48, 49). The trial court stated that because of the waiver at the pretrial proceeding the question of the voluntariness of the statement was also waived (T. 49). While not overruling the objection, the trial court coerced the petitioner into withdrawing the objection.

When the petitioner claimed his purported confession was involuntary, the Fourteenth Amendment's due process clause placed a duty on the judge to conduct a hearing and independently resolve the issue. If he finds the confession to be involuntary, it is to be rejected. *Jackson v. Denno*, supra.

This Court in *Sims v. Georgia*, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed. 2d 593 (1967), held the rule of *Jackson v. Denno* supra, to be "a constitutional rule binding upon the States, and under the Supremacy Clause of Article VI of the Constitution, it must be obeyed."

This Court must make its own examination of the record and make an independent determination as to the voluntariness of petitioner's statement or confession. *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 518 (1963).

There is ample evidence from the record that petitioner was intoxicated when making statements to various law enforcement officers (T. 9, 39, 54). Petitioner was not given his rights under *Miranda v. Arizona*, supra, and did not have the benefit of counsel when he made statements to the police. It is clear that the trial court intimidated petitioner's counsel and coerced him into withdrawing his objection to the admission of petitioner's written statement into evidence on the basis that it was not volun-

tarily made and thereby denying petitioner a hearing on the issue of voluntariness of the statement as required by *Jackson v. Denno*. These issues go to the heart of due process of law and were fairly before the Arkansas Supreme Court on petitioner's appeal. The Arkansas Supreme Court erroneously ruled that petitioner was not deprived of due process of law under the Fourteenth Amendment.

III

The Arkansas Supreme Court's finding that there was no preoccupation on the part of the trial judge in helping the prosecution obtain a conviction was contrary to the fair trial and due process provision of the Sixth and Fourteenth Amendments, where the record shows conduct and remarks of the trial judge and the prosecutor clearly prejudicial to the petitioner.

Petitioner on appeal raised the issue of the trial court's preoccupation in helping the prosecution obtain a conviction and therefore the issue of the Sixth Amendment's and Fourteenth Amendment's guarantee to a fair and impartial trial was fairly placed before the Arkansas Supreme Court.

Various statements made by the trial court and the prosecution in hearing of the jury were improper and inflammatory and denied petitioner a fair and impartial trial.

The State at the second trial improperly and purposely harassed petitioner's witness on cross-examination (T. 119, 120), when it persisted, over the petitioner's objection, in questioning the witness as to the meaning of his nickname of Daffy.

In *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), this Court imposed a duty on the trial court to protect a witness on cross-examination.

The State's questioning here was clearly for the purpose of harassing and embarrassing petitioner's witness and to place

him in a false light before the jury. Petitioner's objection was overruled by the trial court, clearly demonstrating the trial court's bias against petitioner.

In response to the State's question, the following exchange occurred:

> "A. I'll take number five on that until we discuss it.
>
> The Court: I will give you number one, and number two, you can answer it, and then explain it." (T. 120)

Again the trial court's bias against petitioner comes forward by the Judge's hostile and improper admonishment of a witness before the jury.

> "Hostility is a form of bias. * * * but a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial." *Whittaker v. McLean*, 118 F.2d 596; *Knapp v. Kinsey*, 232 F.2d 458. See also *U.S. v. Ah Kee Eng*, 241 F.2d 157, 62 A.L.R. 159.

Courts of the United States

> "* * * shall not only be impartial in the controversy submitted to them, but shall give assurance that they are impartial, free * * * from any 'bias or prejudice' that might disturb the normal course of impartial judgment." *Berger v. U.S.*, 255 U.S. 22, 36, 41 S.Ct. 233, 234, 65 L.Ed. 481 (1921).
>
> "Impartiality is not a technical conception. * * * A fair trial in a fair tribunal is a basic requirement of due process." *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961).

It is clear that petitioner was denied due process of law in that he was denied a fair and impartial trial. This is well founded on:

A. The fact that the judge declared a mistrial and discharged the jury at the first trial without a showing of "manifest neces-

sity" while at the second trial he sent the jury back for further deliberation;

B. The fact that the proceeding prior to the second trial was inadequate and did not show a knowledgeable waiver by petitioner of his constitutional rights coupled with the use of this alleged "waiver" to coerce the petitioner into not exercising his constitutional right to a hearing as required by *Jackson v. Denno*, supra; and

C. The demonstrable hostility and bias by the trial court by its improper remarks and its allowance of improper remarks by the prosecution.

The entire record as well as the individual incidents establishes an aura of hostility and prejudice on the part of the trial court.

CONCLUSION

The judgment below is a unique departure from the sound principles entrenched in the Fifth, Sixth and Fourteenth Amendments, and from the principles and decisions set forth by this Court which were designed to protect a citizen from being twice placed in jeopardy; from being convicted on a involuntary statement taken from him without benefit of counsel; and without knowingly and intelligently waiving such protections with full understanding of the consequences of the waiver; and from being convicted without a fair trial before an impartial Court. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted

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APPENDIX "A"

Supreme Court of Arkansas

Jimmie L. Walters,
Appellant,
v.
State of Arkansas,
Appellee.
No. CR-73-116

Opinion Delivered Jan. 21, 1974.

Appeal From Van Buren Circuit Court, Joe D. Williams, Judge. Affirmed.

Conley Byrd, Associate Justice

Based upon the conduct of the trial court in discharging a jury and granting a new trial, the appellant Jimmie L. Walters seeks to set aside his subsequent second degree murder conviction upon the ground of former jeopardy or at least to reduce the conviction thereof to a degree not greater than involuntary manslaughter.

The record before us as to what occurred in the first trial is rather meager. The portion upon which appellant relies is set forth in a motion to dismiss as follows:

> "That at the conclusion of the first trial of this defendant, the jury retired to deliberate a verdict and during the course of said deliberation, the Jury reported to the Court that they could not reach a decision and were hung. While determining whether the jury could reach a verdict, the following conversation between the Court and the Jury Foreman occurred:

Court: Have you reached a verdict?

Foreman: No, sir.

Court: What are your numbers now?

Foreman: 7 to 5.

Court: Ladies and gentlemen of the jury, I know some Courts follow the procedure of locking up juries and keeping them for days and often times by doing it, they get a verdict, but this Court doesn't believe in that. I believe that's subjecting you to torture. That's not what you are down here for, to be tortured. You are just citizens doing your duty. You have told me there were two things you were considering—guilt or innocence?

Foreman: Yes, sir.

Court: If the proposition had been voted on, what would have been the degree?

Foreman: About the least.

Court: You mean you were hung up between involuntary manslaughter and not guilty?

Foreman: Yes, sir."

The doctrine of former jeopardy has been set forth in *Atkins v. State*, 16 Ark. 568, 578 (1855) in this language, quoting from the still leading case of *United States v. Perez*, 9 Wheat. 579. 6 L. Ed. 165 (1824):

" 'We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all

> the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge, and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the judges under their oath.' "

We do not read anything in *Gori v. United States*, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961), nor in *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1970), as holding to the contrary.

Because of the fact the trial court went beyond the determination that the jury was hung between guilt and innocence and determined that they were hung between a verdict of involuntary manslaughter and not guilty, appellant suggests there was a preoccupation by the trial court in helping the prosecution obtain a conviction. While we must admit that the inquiry was inadvisable, we cannot read appellant's suggestion into this meager record. It appears to us that the trial court had already indicated that he was going to grant a mistrial before making the inquiries as to involuntary manslaughter and not guilty. On the meager record before us we cannot say that the trial court abused his discretion in determining that the jury was hopelessly deadlocked. Consequently, we need not speculate as to what our conclusion would have been had such information been first obtained or had the record shown how long the jury had been deliberating.

Neither can we agree with appellant that the first trial resulted in an implied acquittal of all degrees in excess of involuntary manslaughter. The statements between the trial court and

the jury foreman cannot be considered under the circumstances as a verdict of the jury. See Ark. Stat. Ann. § 43-1226 (Repl. 1968).

Affirmed.

Harris, C. J., not participating.

APPENDIX "B"

Guilty verdict. Felony

In the Circuit Court of Van Buren County, Arkansas

Criminal Docket

State of Arkansas — Plaintiff

vs. — No. CR5-73

Jimmie L. Walters — Defendant

Judgment

On this 10 day of May, 1973, same being a day of the May term of this Court there appears the State of Arkansas by Kenneth Smith Prosecuting Attorney and the defendant appears in person and by his attorney Buford Gardner and Defendant waives arraignment and enters a plea of not guilty to the charge of Murder in the First Degree as charged in the information filed herein.

All parties announce ready for trial and there is duly empaneled and sworn a jury consisting of twelve petit jurors for the term, to-wit: Robert R. Shannon and eleven other jurors, to try this cause after they have been examined as to their qualifications and all found competent.

This cause was submitted to the said jury upon the evidence introduced, the instructions of the Court and the argument of counsel and the jury retired to consider its verdict and after due deliberation the jury returned into Court the following

verdict: We the jury find the defendant guilty of murder in the second degree and fix his punishment at . . . . . with the Arkansas Dept. of Correction.

/s/ Robert R. Shannon
Foreman

It Is Therefore by the Court Considered, Ordered and Adjudged that the defendant is hereby adjudged to be guilty of the crime of Murder in the Second Degree and the defendant is remanded to the custody of the Sheriff of this county to be by him kept in custody until such time as it may be found convenient to transfer custody to the Superintendent of the Arkansas Department of Correction, there to be confined at hard labor for a period of five years from this date.

/s/ Joe D. Villines
Circuit Judge

Filed for record on this 10th day of May, 1973, at 6:45 P.M., and the same is now duly recorded in Circuit Court Record J, on page 1, on this 11th day of May, 1973.

Sammy Collums
Clerk

By: /s/ Rita Richardson
Deputy Clerk

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1973

NO. A-984

JIMMIE L. WALTERS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 255 Ark. 904, 503 S.W. 2d 895 and is reproduced as an appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the trial court erred in declaring a mistrial after having been informed that the jury could not reach a verdict.
2. Whether Petitioner's subsequent trial constituted double jeopardy in violation of the Fifth and Four-

teenth Amendments to the United States Constitution.

3. Whether petitioner was denied due process and a fair and impartial trial.

STATEMENT

Petitioner herein was charged with first degree murder in an information filed February 13, 1973 in the Circuit Court of Van Buren County, Arkansas.

After deliberating for an unspecified period of time the jury foreman reported to the trial court that the jury was hopelessly deadlocked. After expressing an intention to declare a mistrial the judge inquired of the jury as to the stage of their deliberations:

COURT:

> If the proposition had been voted on, what would have been the degree?

FOREMAN:

> About the least.

COURT:

> You mean you were hung up between involuntary manslaughter and not guilty?

FOREMAN:

> Yes, sir. (T. 7-A)

The Court declared a mistrial and petitioner was subsequently re-tried for first degree murder. At the second trial the jury brought in a verdict of guilty of second degree murder and punishment was fixed at five (5) years imprisonment.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DECLARING A MISTRIAL.

Petitioner contends that the trial court should not have declared a mistrial at his first trial for murder, that there was no manifest necessity for that action, and that the mistrial was declared without petitioner's consent.

The simple fact is this: the mistrial was declared after the court was informed by the jury foreman that a verdict was impossible. (T. 7-A)

It is well settled that an exception to the double jeopardy prohibition exists where an unforeseeable circumstance forces a termination of the trial without verdict and that the inability of the jury to agree, after proper deliberation, is such a circumstance. *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165; *Logan v. United States*, 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429; *Gori v. United States*, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901; *Potter v. State*, 42 Ark. 29.

The record does not indicate how long the jury had deliberated but it is clear that the court was informed that the jury could not reach a verdict. It was properly within the trial judge's discretion to declare a mistrial.

The case of *U.S. v. Jorn*, 400 U.S. 470, 91 S. Ct. 547 (1971) is inapplicable to the case at bar. There a mistrial was declared to enable the government to better prepare its case.

The trial judge clearly indicated his intention to declare a mistrial before he addressed the jury concerning the substance of their deliberations. (T. 7-A) There is simply no evidence that the court's action was "arbitrary."

II.

PETITIONER'S CONVICTION DID NOT CONSTITUTE DOUBLE JEOPARDY.

Having demonstrated that the mistrial was within the court's discretion and was occasioned by the jury's inability to reach a verdict, Respondent would submit that a double jeopardy situation did not arise, relying on the previously cited cases. *Perez, supra*; *Logan, supra*; *Gori, supra.*

Petitioner argues that since the first jury indicated that no degree of criminal homicide higher than involuntary manslaughter was being considered, that a subsequent prosecution for first degree murder was barred since the first jury ". . . had already acquitted the petitioner of any offense higher than involuntary manslaughter. . ." (Petitioner's brief, p. 9). This statement ignores the fact that the first jury was unable to reach a verdict. It would obviously be absurd to allow jury deliberations which did not result in a verdict to influence subsequent proceedings.

For this reason the cited cases of *Green v. U.S.*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) and *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757 (1970) are inapplicable. Both of these cases involved new trials after successful *appeals* of jury *verdicts.*

III.

THE RECORD DOES NOT INDICATE THAT PETITIONER WAS DENIED A FAIR TRIAL OR THAT THE TRIAL COURT WAS "PREOCCUPIED" WITH AIDING THE PROSECUTION.

Petitioner contended on appeal that the trial court was preoccupied with obtaining a guilty verdict as evidenced by the court's failure to declare a mistrial in the second trial. The record indicates that the second jury never indicated that they could not reach a verdict and there is no indication that a mistrial would have been appropriate under the circumstances.

Respondent wishes to point out that the complaint concerning the admission into evidence of petitioner's statement to the police and the allegations of bias as evidenced by ". . . a hostile and improper admonishment of a witness. . ." are raised here for the first time and were neither presented to nor considered by the Arkansas Supreme Court. Respondent must deny the allegation that the issues were placed before the court below as alleged in petitioner's brief at pages 10 and 12.

This case was briefed and argued orally before the Arkansas Supreme Court. The issues raised on appeal are discussed in the opinion. Since the certiorari petition prays review of the lower court's opinion it is improper to attempt to raise issues therein for the first time.

However, respondent specifically denies that the record in this cause indicates bias on the part of the trial judge or denial of due process of law to petitioner.

CONCLUSION

The opinion of the Arkansas Supreme Court is clearly correct and conflicts with no federal statute or decision. It is therefore respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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